(4)

No. 91-1162

Supreme Court, U.S.
FILED
MAR 16 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

SID GOODMAN & COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT S. GREENSPAN
JOHN P. SCHNITKER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's conduct in bribing the purchasing agents of retail produce businesses, to induce the agents to buy produce from petitioner, violates Section 2(4) of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. 499b(4), which prohibits PACA licensees, such as petitioner, from "fail[ing], without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any" transaction involving perishable agricultural commodities.

2. Whether, in interpreting Section 2(4) of PACA to prohibit commercial bribery, the Secretary of Agriculture properly proceeded by adjudication rather than by rulemaking.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	12

TABLE OF AUTHORITIES

Cases:

American Distilling Co. v. *Wisconsin Liquor Co.*, 104 F.2d 582 (7th Cir. 1939)	8
Arkansas v. *Oklahoma*, No. 90-1262 (Feb. 26, 1992)	9
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	4, 9
Farley & Calfee, Inc. v. *Department of Agriculture*, 941 F.2d 964 (9th Cir. 1991)	7
Ford Motor Co. v. *FTC*, 673 F.2d 1008 (9th Cir. 1981), cert. denied, 459 U.S. 999 (1982)	11
Frio Ice, S.A. v. *Sunfruit, Inc.*, 918 F.2d 154 (11th Cir. 1990)	7
Grace v. *E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976)	8
Harry Klein Produce v. *Department of Agriculture*, 831 F.2d 403 (2d Cir. 1987)	7
Holiday Food Services, Inc., 45 Agric. Dec. 1034 (1986), aff'd *sub nom. Holiday Food Service, Inc.* v. *Department of Agriculture*, 820 F.2d 1103 (9th Cir. 1987)	8-9
Martin v. *OSHRC*, 111 S. Ct. 1171 (1991)	10
National Beef Packing Co., 36 Agric. Dec. 1722 (1977), aff'd *sub nom. National Beef Packing Co.* v. *Secretary of Agriculture*, 605 F.2d 1167 (10th Cir. 1979)	8, 9
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974)	10, 11

Cases—Continued: Page

NLRB v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969) 10
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 10, 11
Stoller v. *CFTC*, 834 F.2d 262 (2d Cir. 1987) 11
Tipco, Inc. v. *Yeutter*, No. 91-1435 (4th Cir. 1992) 5
Tri-County Wholesale Produce Co. v. *Department of Agriculture*, 822 F.2d 162 (D.C. Cir. 1987) 7
W.J. Westcott Co. v. *Yonk Rubin & Son*, 122 F. Supp. 888 (E.D. Pa. 1954) 5

Statutes and regulation:

Act of Apr. 6, 1942, ch. 211, 56 Stat. 200 7
Federal Alcohol Administration Act § 5(c), 27 U.S.C. 205(c) 8
Packers and Stockyards Act § 202, 7 U.S.C. 192 8
Perishable Agricultural Commodities Act, ch. 436, § 1, 46 Stat. 531, 7 U.S.C. 499a *et seq.* 2, 6
§ 2(4), 7 U.S.C. 499b(4) 2, 3, 5, 6, 7, 8, 9, 10
§ 7h(a), 7 U.S.C. 499h(a) 3
Robinson-Patman Act § 2(c), 15 U.S.C. 13(c) 8
7 C.F.R. 46.26 (1991) 6, 11

Miscellaneous:

2 R. Callman, *The Law of Unfair Competition, Trademarks and Monopolies* (3d ed. 1967) 8
88 Cong. Rec. (1942):
p. 290 7
pp. 2519-2520 7
p. 3173 7
H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930) 6
H.R. Rep. No. 1840, 77th Cong., 2d Sess. (1942) 7
H.R. Rep. No. 543, 98th Cong., 1st Sess. (1983) 6
S. Rep. No. 1188, 77th Cong., 2d Sess. (1942) 7

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1162

SID GOODMAN & COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals, Pet. App. 2a-14a, is unpublished but the decision is noted at 953 F.2d 639 (Table). The decision and order of the Secretary of Agriculture (Secretary), Pet. App. 15a-44a, is reported at 49 Agric. Dec. 1169. The initial decision and order of the Administrative Law Judge (ALJ), Pet. App. 45a-74a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1991. The petition for a writ of certiorari was filed on January 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a wholesale distributor of agricultural produce and is licensed pursuant to the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. 499a *et seq.* In 1988, petitioner sold five lots of melons on consignment for M. Offutt Co., Inc. (Offutt). Offutt later complained to the United States Department of Agriculture (USDA) that petitioner had furnished inaccurate accounts of sale with respect to those transactions. The USDA investigated the matter and determined that petitioner failed to make full and prompt payment to Offutt of over $5000. Pet. App. 3a-4a.

In the course of the investigation, the USDA also discovered that petitioner was bribing the purchasing agents of Magruder, Inc. (Magruder) and Fresh Value, Inc. (Fresh Value), to induce the agents to buy produce from petitioner rather than from competitors. The scheme worked as follows. Petitioner would mark up the price of produce sold to Magruder and Fresh Value by 25 cents per package. Petitioner would then pay that premium to the purchasing agent as a "kickback." Afterwards, petitioner would fail to report the mark-ups on the invoices submitted to Magruder, Fresh Value and Offutt. The payments to the purchasing agents totalled $107,000 over a 20-month period. Pet. App. 3a-5a.

2. The USDA filed an administrative complaint against petitioner seeking revocation of petitioner's PACA license. The USDA charged that petitioner flagrantly and repeatedly violated the first three unnumbered clauses of Section 2(4) of PACA, 7 U.S.C. 499b (4).[1] Specifically, the USDA alleged that petitioner:

---

[1] The Secretary is authorized to revoke a PACA license when the licensee's violations of the statute are "flagrant or

(1) made false statements on invoices submitted to Magruder, Fresh Value, and Offutt; (2) failed to correctly account and make full and prompt payment to Offutt; and (3) breached an implied duty owed to Magruder and Fresh Value to refrain from bribing their employees. Pet. App. 4a-5a. The ALJ conducted a hearing and concluded that petitioner had violated PACA as alleged. *Id.* at 57a-59a. Based on the three violations of Section 499b(4), the ALJ revoked petitioner's PACA license. Pet. App. 72a-74a. On appeal, the Secretary affirmed the ALJ. *Id.* at 15a-44a.[2]

---

repeated." 7 U.S.C. 499h(a). Section 2(4) of PACA, 7 U.S.C. 499b(4), provides in relevant part as follows:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> * * * * *
>
> (4) For any commission merchant, dealer, or broker [1] to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or [2] to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or [3] to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction * * *.

[2] Petitioner asks this Court to review only the third of three findings supporting the Secretary's decision to revoke petitioner's PACA license. See Pet. 7 n.11. There is certainly reason to believe that the Secretary would have revoked petitioner's license based on the first and second PACA violations alone since he found that these violations were "willful." See

3. The court of appeals affirmed the Secretary in an unpublished per curiam decision. Pet. App. 2a-14a. The court held that the Secretary's interpretation of PACA—as prohibiting commercial bribery—comports with the statute's plain language and legislative history. The court further decided that, in any event, the Secretary's construction of the statute is permissible and is therefore entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 7a-10a. Finally, the court concluded that the Secretary had properly proceeded by adjudication rather than by rulemaking. *Id.* at 11a-12a.[3]

ARGUMENT

The petition presents two questions. The first is whether the Secretary erred in interpreting the "implied duty" clause of PACA to prohibit commercial bribery by produce sellers licensed under the statute. The second is whether the Secretary, in adopting that interpretation, properly proceeded by adjudication rather than by rulemaking. The court of appeals, in a well reasoned decision, held that the Secretary's construction of PACA was not only permissible but correct, Pet. App. 7a-10a, and found that it was properly made in the course of the adjudication, *id.* at 11a-12a. Neither question involves a split in circuit

---

Pet. App. 42a. The Secretary's opinion does not address this issue, however.

[3] In addition, the court rejected several arguments that petitioner no longer advances: (1) that PACA violates due process; (2) that the invoices petitioner submitted to Magruder and Fresh Value were not "false statements" within the meaning of PACA; and (3) that petitioner's conduct was neither "willful" nor sufficiently "flagrant or repeated" to warrant revocation of its PACA license. Pet. App. 10a-14a.

authority; only one other decision has applied PACA to commercial bribery,[4] and that unpublished decision is consistent with the unpublished decision in this case. Finally, the questions presented are of limited significance. Further review is therefore unwarranted.

1. Petitioner claims that the Secretary's interpretation of PACA's "implied duty" clause conflicts with the plain language of the statute and with its legislative history. Pet. 8-16. That contention is meritless.

a. The "implied duty" clause provides as follows:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> * * * * *
>
> (4) For any commission merchant, dealer, or broker * * * to fail, without reasonable cause, to perform *any* specification or duty, express or implied, arising out of *any* undertaking in connection with any such transaction * * *.

7 U.S.C. 499b(4) (emphasis added). Section 499b(4) makes it unlawful for PACA licensees to fail to perform "any" implied duty arising out of "any" undertaking in connection with a transaction involving perishable agricultural commodities. 7 U.S.C. 499b (4).[5] Congress did not specify what duties PACA licensees owe the parties to such transactions, and

---

[4] See *Tipco, Inc.* v. *Yeutter*, No. 91-1435 (4th Cir. Jan. 30, 1992) (per curiam) (unpublished), slip op. 5-6 (affirming Secretary's revocation of the PACA license of another produce seller who bribed Magruder's purchasing agent).

[5] Only one published decision has addressed this provision of PACA. See *W.J. Westcott Co.* v. *Yonk Rubin & Son*, 122 F. Supp. 888, 891-892 (E.D. Pa. 1954) (noting broad language of clause and upholding Secretary's interpretation of it in that case).

its decision to leave the matter open undoubtedly was deliberate. As the court of appeals held, the broad language of Section 499b(4) reflects Congress's intention to ban a wide range of undesirable practices in the produce market, and to "afford the Secretary the authority to exercise the expertise and discretion necessary to regulate specialized problems that may arise in the perishable agriculture commodities industry on a case-by-case basis." Pet. App. 7a.[6]

The legislative history of the "implied duty" clause is sparse, but what little exists supports the Secretary's interpretation of the provision. PACA was enacted in 1930, see Perishable Agricultural Commodities Act, ch. 436, § 1, 46 Stat. 531, to suppress "unfair and unethical practices," and to force produce merchants "to conduct [their] business[es] according to long-established principles of honesty and fair dealing." H.R. Rep. No. 1041, 71st Cong., 2d Sess. 2 (1930).[7] The "implied duty" clause was

---

[6] Consistent with that aim, the Secretary has promulgated the following regulation:

> It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

7 C.F.R. 46.26.

[7] See also H.R. Rep. No. 543, 98th Cong., 1st Sess. 3 (1983) ("The Perishable Agricultural Commodities Act was enacted in 1930 to encourage fair trading practices in the marketing of perishable commodities by suppressing unfair and fraudu-

added by amendment in 1942. See Act of Apr. 6, 1942, ch. 211, 56 Stat. 200. The amendment was prompted by a federal court's restrictive interpretation of the preceding clause in Section 499b(4), regarding the duty to "account." See S. Rep. No. 1188, 77th Cong., 2d Sess. 1-3 (1942); H.R. Rep. No. 1840, 77th Cong., 2d Sess. 1-2 (1942). The court had held that the duty to "account" did not entail a duty to make full payment. S. Rep. No. 1188, *supra*, at 2. In response to that decision, Congress inserted the words "and make full payment" after "account." *Id.* at 3. Congress then went a step further and added the "implied duty" clause, with its language of general prohibition, to the end of Section 499b(4). H.R. Rep. No. 1840, *supra*, at 3. Given the context of the 1942 changes, it is likely that Congress intended the "implied duty" clause to expand the reach of the statute to further the initial purpose of prohibiting "unfair and unethical practices." [8]

---

lent business practices."); *Farley & Calfee, Inc.* v. *Department of Agriculture*, 941 F.2d 964, 966 (9th Cir. 1991) (PACA "was aimed at preventing unfair business practices and promoting financial responsibility in the fresh fruit and produce industry."); *Frio Ice, S.A.* v. *Sunfruit, Inc.*, 918 F.2d 154, 155 (11th Cir. 1990) ("Congress enacted PACA in 1930 to encourage fair trading practices in the marketing of perishable commodities."); *Harry Klein Produce* v. *Department of Agriculture*, 831 F.2d 403, 405 (2d Cir. 1987) (same); *Tri-County Wholesale Produce Co.* v. *Department of Agriculture*, 822 F.2d 162, 163 (D.C. Cir. 1987) (per curiam) ("Congress enacted PACA in 1930 in an effort to assure business integrity in an industry thought to be unusually prone to fraud and to unfair practices.").

[8] There is little other evidence of Congress's intent. See 88 Cong. Rec. 290 (1942) (introduction of bill by Rep. Fulmer); 88 Cong. Rec. 2519-2520 (1942) (bill passed by the House

b. Against this background, the Secretary interpreted the "implied duty" clause to prohibit commercial bribery. Pet. App. 30a-36a. The Secretary defined commercial bribery as "[T]he 'offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the "gift," be sufficiently influenced by the offer to favor the offeror over other competitors.'" *Id.* at 33a (quoting 2 R. Callmann, *The Law of Unfair Competition, Trademarks and Monopolies* § 49 (3d ed. 1967)). The Secretary observed that commercial bribery has been declared an unfair trade practice under several federal statutes. Pet. App. 33a-34a.[9] Indeed, the Secretary noted, two of its own prior opinions had condemned commercial bribery in a related context. *Id.* at 34a-35a.[10] The Secretary

---

with brief comment); 88 Cong. Rec. 3173 (1942) (bill passed by the Senate with no comment).

[9] See, *e.g.*, Section 202 of the Packers and Stockyards Act, 7 U.S.C. 192, *National Beef Packing Co.* v. *Secretary of Agriculture*, 605 F.2d 1167, 1168-1169 (10th Cir. 1979); Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c), *Grace* v. *E.J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976); Section 105(c) of the Federal Alcohol Administration Act, 27 U.S.C. 205(c), *American Distilling Co.* v. *Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939).

Contrary to petitioner's assertions, Pet. 14-16, the mere fact that petitioner's conduct may violate other federal and state laws does not indicate that Congress intended that commercial bribery would not be covered by the broad prohibition in Section 499b(4), directed at the breach of "*any* specification or duty, express or implied, arising out of *any* undertaking" in connection with transactions involving perishable agricultural commodities. 7 U.S.C. 499b(4) (emphasis added).

[10] See *Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1042-1043 (1986), aff'd *sub nom. Holiday Food Service, Inc.*

then reasoned that, because "Congress' goal in enacting PACA was to prohibit unfair trading practices in the produce industry," the "implied duty" clause should be read to impose on PACA licensees the duty to refrain from bribing their customers' purchasing agents. *Id.* at 36a.

The court of appeals recognized that PACA leaves substantial discretion to the Secretary to delineate the duties of licensees, Pet. App. 7a, and that "[t]he Secretary has consistently enforced the PACA to ensure that members of the industry deal fairly with one another at arm's length." *Id.* at 8a. The court therefore applied the standard of review announced in *Chevron*, 467 U.S. at 843, and held that the Secretary's construction of PACA is permissible. Pet. App. 8a-10a. See also *Arkansas* v. *Oklahoma*, No. 90-1262 (Feb. 26, 1992), slip op. 15, 18-20. That decision is unassailable. The plain language and legislative history of PACA fully support the Secretary's interpretation of the statute. Further review is unwarranted.[11]

---

v. *Department of Agriculture*, 820 F.2d 1103 (9th Cir. 1987); *National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-1729 (1977), aff'd *sub nom. National Beef Packing* v. *Secretary of Agriculture*, 605 F.2d 1167 (10th Cir. 1979).

[11] Petitioner contends, Pet. 11, that because Section 499b(4) addresses the "fail[ure] * * * to perform" an express or implied duty, it does not prohibit "affirmative" misconduct such as bribery. But a negative duty—in this case the duty not to bribe—is no less a duty for its negative character, and refraining from the conduct proscribed is just as much a "performance" of that duty. Moreover, in light of the reason for the 1942 amendments to Section 499b(4), it is unlikely that Congress intended that the Secretary would regulate only the omissions of licensees, and not their affirmative misconduct.

Petitioner is also incorrect in claiming, Pet. 12-13, that the Secretary's interpretation of the "implied duty" clause is

2. Nor is review warranted on petitioner's claim, Pet. 17-23, that the Secretary should have proceeded by rulemaking rather than by adjudication. This Court has held that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947)). Indeed, "[a]djudicated cases may and do * * * serve as vehicles for the formulation of agency policies, which are applied and announced therein" and "generally provide a guide to action that the agency may be expected to take in future cases." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-766 (1969). See also *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1177-1178 (1991).

Contrary to petitioner's assertion, Pet. 22, the Secretary did consider the choice between announcing its interpretation of PACA by rulemaking or adjudication. An agency regulation states that, "because of the many types of businesses conducted" under PACA, it would be "impracticable to specify in detail all of the duties of" PACA licensees, and therefore the "responsibility is placed on each licensee to fully

---

contradicted by the overall structure of the statute. While Congress enacted specific prohibitions in other sections of PACA, it also provided a broad, general prohibition against the failure to perform "*any* specification or duty, express or implied, arising out of *any* undertaking" in connection with a transaction involving perishable agricultural commodities. 7 U.S.C. 499b(4) (emphasis added). Nothing in PACA suggests that the specific prohibitions limit the more general "implied duty" clause. Indeed, as noted earlier, pp. 6-7, *supra*, there is evidence that Congress intended the clause to prevent just such a narrow reading of the statute.

perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act." 7 C.F.R. 46.26. As in *Chenery* and *Bell Aerospace*, the Secretary concluded that the problem of unfair and fraudulent business practices in the agricultural produce industry is "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." *Chenery*, 332 U.S. at 203. Accord *NLRB* v. *Bell Aerospace Co.*, 416 U.S. at 294.[12] That conclusion is reasonable. In short, there is no need for this Court to review whether the Secretary's decision to proceed by adjudication rather than by rulemaking constituted an abuse of discretion. Clearly, it did not.[13]

---

[12] Petitioner misapprehends the nature of the problem when he argues, Pet. 19 n.26, that the Secretary was required to proceed by rulemaking because commercial bribery is readily definable and is a foreseeable practice in the produce industry. The problem is not the isolated one of defining or anticipating commercial bribery. Rather, the problem is one of promulgating a comprehensive list of *all* fraudulent and unfair practices that may occur in connection with perishable produce transactions, and that may give rise to a violation of duty under the statute. The Secretary reasonably concluded that that task is impractical. Pet. App. 34a.

[13] Petitioner's reliance, Pet. 21-23, on *Stoller* v. *CFTC*, 834 F.2d 262 (2d Cir. 1987), and *Ford Motor Co.* v. *FTC*, 673 F.2d 1008 (9th Cir. 1981), cert. denied, 459 U.S. 999 (1982), is misplaced. *Stoller* was a case where an agency revised an established standard in the course of adjudication. 834 F.2d at 265-266. *Ford Motor* involved a similar reversal of established practice. 673 F.2d at 1010. Here, the Secretary did not revise an existing standard in interpreting PACA to prohibit commercial bribery; PACA clearly covered unfair practices such as commercial bribery when the Secretary applied the statute to petitioner's conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
JOHN P. SCHNITKER
Attorneys

MARCH 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45361